In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 356

STEPHEN ROBLEY EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted for failing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a). On April 21, 1969, he was sentenced to imprisonment for five years (R. 66).[1] The court of appeals affirmed (Pet. App. A).

Petitioner's Selective Service file[2] shows that he first registered in July 1960 on attaining the age of

[1] "R" references are to the record on appeal.

[2] We are filing with the Clerk of this Court a copy of petitioner's Selective Service file, to which we refer here as "F."

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18 (F. 2). After leaving college in the spring of 1966, he was reclassified I–A, found physically acceptable, and ordered to report for induction on October 26, 1966 (F. 38, 40–42). Petitioner's induction was held in abeyance, however, pending security clearance [3] and petitioner was informed that he would be notified ten days in advance of a new reporting date (F. 49, 51, 57).

On December 21, 1966 and March 9, 1967, petitioner asked for and received SSS Form 150 to assert a claim to conscientious objector status (F. 52, 53, 59). The Board received his completed SSS Form 150 on March 15, 1967 (F. 71). In his answers, petitioner claimed to be opposed to participation in war in any form since it inevitably is life destroying (F. 73). This belief, although admittedly not based on organized religious teachings, was said to be based on experience and exposure in life "as is common with any religious belief" (F. 72).[4] Petitioner gave further expression to his belief in a number of written communications with the Board (F. 109, 119, 158). Letters, including one from the petitioner's parents who

[3] Petitioner had apparently "qualified" his security clearance form D.D. 98; that is, he listed membership or association with organizations necessitating clearance (Transcript of trial at "T." 40).

[4] Petitioner indicated in the form that he believed in an entity which directs man towards a harmonious being and a love of life, and that to destroy or even injure life would be to act in direct discordance with this entity (F. 71, 73). Petitioner described his belief in force as only that necessary to restrain "when there is absolutely no other alternative available" and asserted that war is not an example of the use of restraining force since "no war * * * need have [been] begun" (F. 72–73).

disagreed with him, were submitted. All attested to his sincerity (F. 80, 83, 85, 91). The Board retained petitioner's I–A classification and he was granted a personal appearance.

On July 9, 1967, two days prior to his personal appearance, petitioner submitted a letter to the Board to be included in his file. It indicated that he had made a request that counsel be allowed to appear with him before the Board and he had been informed by a clerk that he must appear alone (F. 100). He did so, and after the personal appearance summaries of the hearing were prepared by both the Board and the petitioner (F. 104, 108).

According to the Board summary, petitioner stated that his belief was a religious one, "that life is a sacred entity." He was asked if he belonged to an established religion and replied in the negative. He was told that the Board could order civilian work only if "his beliefs [were] religious, not personal." He indicated to the Board that he felt he came within this Court's ruling in *United States* v. *Seeger,* 380 U.S. 163 (F. 104–105). Petitioner's summary generally agreed with that of the Board, except petitioner quoted the Board members as stating that the reason he was not to be given an I–O classification was that he did not belong to any established religion (F. 108–109). Both summaries also reflected that petitioner brought with him two persons whom he wanted to appear as witnesses on his behalf. The Board refused to hear them, indicating that witnesses "were not necessary as the registrant was under oath and could

answer all questions" (F. 105). The two individuals subsequently filed letters attesting to the nature and sincerity of petitioner's beliefs (F. 112, 115–116).

Following the interview, the Board voted the same day to reject petitioner's claim and to classify him I–A (F. 106–107). Petitioner was permitted to appeal this classification (F. 119) and the Appeal Board unanimously affirmed the classification on September 21, 1967 (F. 123).

On September 26, 1967, petitioner submitted a letter to the local board requesting an interview with the medical review officer (F. 124) on the question of the disabling effect of an old injury (F. 130). In May 1968, after an examination, he was notified that he had been found fit for induction, and he was ordered, on the basis of an outstanding induction notice, to report for induction on June 18, 1968 (F. 154). He then sought classification as a student, claiming he was enrolled for a university summer session (F. 155). His request was denied. On June 18, 1968, petitioner reported for but refused to submit to induction. His prosecution followed.

1. Petitioner contends that under *Welsh v. United States,* No. 76, O.T., 1969, decided June 15, 1970, and *United States v. Seeger,* 380 U.S. 163, he was erroneously denied classification as a conscientious objector. He also argues that Selective Service regulation 32 C.F.R. 1624.1(b)—which permits witnesses to appear on a registrant's behalf in the discretion of the local board and forbids a registrant to be represented by counsel before the local board—is unconstitutional.

These contentions presuppose that petitioner is entitled to raise and to have the local board consider a claim to conscientious objector status made for the first time after the mailing of a notice to report for induction under 32 C.F.R. 1625.2. In *Ehlert* v. *United States,* No. 120, this Term, certiorari granted, May 4, 1970, there is presently pending before the Court the issue whether the alleged maturation of conscientious objector beliefs is a circumstance so "beyond the control" of a registrant as to permit local boards on receipt of a SSS Form 150 to reopen a classification once a notice of induction has been mailed. If (as the government there urges) this Court in *Ehlert* affirms the judgment of the Ninth Circuit that a claim to conscientious objector status cannot under the regulations be entertained for the first time after a notice of induction has been mailed, and that the regulation as so construed is valid, that decision would be dispositive of the present petition.[5] We suggest, therefore, that the Court should postpone disposition of this petition until *Ehlert* is decided. If the government's position as to the regulation is sustained in *Ehlert,* the petition in this case should be denied.

[5] This case differs from *Ehlert* in that here the local board decided petitioner's conscientious objector claim on the merits and petitioner was permitted to appeal that denial to the appeal board. Compare *United States* v. *Gearey,* 368 F. 2d 144, 150–151 (C.A. 2), certiorari denied, 389 U.S. 959. Assuming, however, that under *Ehlert* the Selective Service System was not authorized to reopen petitioner's classification, the consideration his claim received was in effect a benefit to which he was not entitled.

2. Should the Court decide in *Ehlert* that local boards must entertain conscientious objector claims received after the mailing of an induction notice, it would then be necessary to consider the contentions made in this petition. However, the question as to the constitutionality of the regulation prohibiting counsel from appearing with a registrant before a local board is currently before this Court in *United States* v. *Weller,* No. 77, this Term, question of jurisdiction postponed to the merits, March 23, 1970, 397 U.S. 985. It would, therefore, seem appropriate for this Court to defer disposition of the instant petition pending the outcome of *Weller*. If the merits in *Weller* are reached, the Court's treatment of the right-to-counsel aspect of the regulation would also seem pertinent to (albeit perhaps not controlling of) the separate contention raised here as to the right-to-present-witnesses branch of that same regulation. See *United States* v. *Nugent,* 346 U.S. 1.

3. Finally, with respect to the claim that petitioner was improperly refused a conscientious objector classification, the fact that petitioner's beliefs may not have had a "religious" foundation appears, under the *Welsh* decision last Term, no longer to be determinative. Nor in our view is this a case like *Capobianco* v. *Laird,* 424 F. 2d 1304 (C.A. 2), where the local board *specifically found,* largely on the basis of the registrant's demeanor and conduct at his personal appearance, that he was insincere.

There is, however, ample support for the Selective Service System's denial of petitioner's claim to conscientious objector status. For, we do not have here a claim premised on beliefs that had first matured *after* the notice of induction had been mailed to petitioner. See 32 C.F.R. 1625.2(b). To the contrary, petitioner's form (submitted March 15, 1967) indicated that his belief "is the result of 24 years of experience and exposure"; also he stated that he had "for some time now, refrained from saluting the flag of the United States of America or from paying homage to the United States in any way * * *." (F. 72). In addition, a letter from an individual who stated that petitioner had been her best friend for nearly two years indicated that he had "always spoken against violence and discouraged it in others" (F. 85). A similar letter from a friend who had known petitioner for six years contained no intimation that petitioner's conscientious objector beliefs were newly derived (F. 80–81).

As we pointed out in our Memorandum in *Posner* v. *United States,* No. 151, this Term, despite the divergence of views in the circuits on the *Ehlert* issue, the courts of appeals are uniform in holding that when a timely claim for conscientious objector status is not made, the exemption may be denied on that basis alone. See, *e.g., United States v. Gearey,* 379 F. 2d 915, 918 (C.A.2). Here there was ample basis for concluding that although petitioner may have held qualifying conscientious objector views, those views

had not changed following the mailing of the notice to report for induction. Accordingly, further review of his classification is not warranted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970